B. The Elements Of A Taking. When determining whether a federal agency action qualifies as a "taking" forbidden by the Fifth Amendment, the Supreme Court has primarily relied on ad hoc factual inquires into the circumstances of each case. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986) ("Connolly"). Three factors have particular significance:

- The economic impact of the regulation on the claimant;
- The extent to which the regulation has interfered with distinct investment-backed expectations; and
- The character of the government action.

Id. at 224-25; see also Atlas Corp. v. United States, 895 F.2d 745, 756-757 (Fed. Cir. 1990); United States v. One (1) 1979 Cadillac Coupe de Ville, 833 F.2d 994, 1000 (Fed. Cir. 1987); Penn Central Transportation Company v. New York City, 438 U.S. 104, 124 (1978)("Penn Central"). Any single factor may be determinative as to whether there has been a taking. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

In the instant case, these factors considered in combination or alone demonstrate that the FCC's imposition of foreign carrier settlement rate benchmarks on CWI's Section 214 authorizations for international resale would be a taking under the Fifth Amendment.

C. The Economic Impact. In United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990)("United"), the court found that there had been a taking when, due to prolonged inaction by the Department of the Interior, valuable mining leases expired without the claimant being able to begin mining. When reviewing the economic impact of the Interior Department's failure to act, the court found it significant that the claimant had expended approximately $5.3 million in securing the leases and exploration of the leasehold for uranium. Id. at 1435. The court found that the profits the claimant would have realized if it had been permitted to mine the leased land to be part of the economic impact of the Interior Department's action. Id. at 1435-1436.

Similarly, in this case there is no question that the economic impact of the regulation on CWI would be severe. CWI has expended hundreds of millions of dollars investing in switching equipment, transmission facilities, and U.S. employees to develop a profitable carrier business, as well as the significant resources required to prepare and prosecute all necessary state and federal licenses, including dozens of Section 214 applications. Moreover, CWI has also expended significant start-up and operational costs required to offer international service. CWI has paid regulatory fees imposed by the FCC and will be assessed for mandatory Universal Service Fund contributions.

The C&W companies submit that the economic impact of the contemplated action alone would be sufficient to demonstrate a taking. It is worth noting that the FCC has found each country to be a separate market, and therefore each route constitutes a separate line of business for CWI. Adopting the resale Section 214 condition would effectively terminate approximately 30 lines of business currently pursued by CWI, compromise CWI's ability to be a full service carrier, waste CWI's significant investment in providing international resale, and deprive CWI of the significant profits it would have reaped under its current Section 214 authorizations. The adverse economic impact of these actions to CWI, considered in the aggregate or individually, would be significant.

D. Interference With Distinct Investment-Backed Expectations. CWI has invested many tens of millions of dollars in establishing an international telecommunications business. A significant aspect of CWI's business is its ability to resell international service. CWI entered into this business in the United States and secured the necessary Section 214 authorizations from the FCC with the reasonable expectation that it could use those authorizations to establish its business profitably. Adoption of a resale Section 214 condition would drastically alter CWI's investment-backed expectations without just compensation, thereby constituting an unlawful taking under the Fifth Amendment. See United at 1437.

In NRG v. United States, 24 Cl. Ct. 51, 62 (1991)("NRG"), in determining that the claimant was due compensation for the taking of mineral license rights, the court stated:

> "[T]he government chose to modify the established rules after the pertinent agreements were entered. It certainly was not reasonably foreseeable at the time the instant permits were signed that the government would enact legislation cancelling them."

As such, it is not relevant if the FCC generally has authority to modify Section 214 authorizations. Rather, the issue for a claim of taking is whether CWI reasonably could have anticipated that the FCC would modify its Section 214 authorizations in such a manner as to destroy its ability to continue to provide international resale on particular routes. Under the circumstances here, CWI could not reasonably have anticipated the adoption of the proposed condition, which accordingly constitutes an unlawful taking regardless the FCC's authority to modify Section 214 authorizations.

E. The Character Of The Governmental Action. An agency action that is a taking must: (1) take property for a public use; and (2) provide for just compensation. In this matter, the character of the FCC's action is to take for public use, but not to provide just compensation. The FCC would effectively revoke CWI's resale Section 214 authority on approximately 30 routes in the (misguided) belief that such action would prevent predatory pricing conduct to the detriment of competitive conditions in the U.S. market. The requirement of "public use" in the context of takings is interpreted so broadly that public use is "coterminous with the scope of a sovereign's police powers." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984) ("Midkiff"). Therefore, Section 214 modifications constitute a public use.

F. Lack of Authority. The FCC does not have the statutory authority to modify CWI's Section 214 authorizations as proposed. In Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) ("Bell Atlantic"), the Court of Appeals found that the FCC did not have the authority to require physical collocation. The court determined that even though the FCC had authority to require physical connections under Section 201 of the Communications Act of 1934, as amended (the "Act"), because there was no expressed or necessarily implied authority to order physical collocation in the Act, the FCC did not have the authority to order physical collocation. Id. at 1447. The Bell Atlantic case is reflective of a trend in successful takings claims. See Dolan v. City of Tigard, 114 S.Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992); and Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

Further, in Bell Atlantic the Court of Appeals ruled that "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions." Bell Atlantic at 1445; see also United States v. Security Industrial Bank, 459 U.S. 70, 82 (1982) ("Security Industrial"), distinguished United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 n.5 (1985) ("Riverside"). Here, applying the strict test of statutory authority in light of the Constitutional implications, an FCC action modifying CWI's Section 214 authorizations would be unlawful because there is no expressed or necessarily implied statutory authority to effect such a taking.

In both Bell Atlantic and Security Industrial, the courts narrowly construed the statute based upon their ability to identify a class of cases in which the regulation would constitute a taking. See also Riverside at 128 n.5. In the instant matter, a narrow construction of the Act is appropriate to avoid a taking of the rights held by international resale carriers that are affiliated with foreign carriers. To avoid having to compensate each of the carriers in the class, a court may find that the FCC did not have the authority to effect such a taking under the Act. Although the actions being reviewed under the factually sensitive standards of Penn Central may not be subject to the same narrow construction, it should be emphasized that the takings issue was not properly before that court. Bell Atlantic at 1444, n. 1. and 1446. Being unable to rule on the issue of takings, the court nevertheless found that because the Act cannot be read to authorize the FCC to effect an uncompensated taking, the FCC did not have that authority. Here, FCC action modifying CWI's Section 214 authorizations will amount to a taking and no provision for just compensation to CWI has been made. Because the Act does not authorize the FCC to effect uncompensated takings, the FCC does not have the authority under the Act to modify CWI's Section 214 authorizations in a manner that takes CWI's business.

## *VIII. IF THE FCC ADOPTS THE RESALE SECTION 214 CONDITION, IT SHOULD ONLY APPLY THE CONDITION PROSPECTIVELY, AS PROPOSED BY AT&T.*

A. Public Interest. In light of the clear harm to consumers, competition and CWI's legitimate investment-backed reliance upon its Section 214 authorizations, the FCC should not apply any new conditions to existing Section 214 resale authorizations. Indeed, consistent with the overall goals of the Foreign Participation proceeding, AT&T's proposal to condition licenses pertained only to new entrants. As noted previously, AT&T proposed in its comments that the condition apply only to new Section 214 authorizations or to those applications pending when the FCC issued its Notice of Proposed Rulemaking in IB Docket No. 96-261 last December. See AT&T Comments at 33 n.60 and 46; accord, AT&T Reply Comments filed August 12, 1997 in Foreign Participation Notice, at 21-22; AT&T Ex Parte Filing submitted July 30, 1997 in Foreign Participation Notice at 2, 8; AT&T Ex Parte Filing submitted August 4, 1997 in Foreign Participation Notice at 2. WorldCom, another proponent of the condition, held a similar view. See WorldCom Comments filed July 9, 1997 in Foreign Participation Notice at 15. The fact that the FCC did not grandfather existing facilities-based Section 214 authorizations for U.S. carriers with foreign affiliates does not foreclose grandfathering existing resale Section 214 authorizations, since the situations are distinguishable. As noted in Section III.B. above, the competitive impact of the condition is considerably worse for carriers who rely on resale Section 214 authorizations, since it effectively forces them to exit the market.

B. Precedent. In numerous cases, the FCC has grandfathered existing licensees under a new or changed policy to avoid creating an undue hardship for existing licensees and disrupting existing business operations. E.g., Foreign Carrier Market Entry Order, 11 FCC Rcd at 3914-15 (FCC grandfathered existing Section 214 authorizations from the new effective competitive opportunities test because it would be "inequitable" to subject such authorizations to the new test); Amendment of Part 90, 10 FCC Rcd 4694, 4728 (1995) (FCC grandfathered existing licensees under new band plan and emission standards to avoid imposing "undue hardship" upon existing operators"); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 803-812 (1978) (upholding FCC decision to grandfather certain newspaper-broadcast combinations to avoid "disruption of the industry," as well as "hardship for individual owners" and "economic dislocations [that] might prevent new owners from obtaining sufficient working capital to maintain the quality of local programming").

C. Congress. Congress also has grandfathered existing licensees in passing a new statute to avoid disrupting existing business or contractual relationships. See Omnibus Budget Reconciliation Act of 1993, 47 U.S.C. § 332(c)(5); Conference Report at 495 (grandfathering foreign ownership affiliations of private mobile radio service licensees reclassified as common carriers from Section 310(b) foreign ownership restrictions to prevent such companies from being "forced to divest themselves of any foreign ownership"); see also Telecommunications Act of 1996 § 713(d)(2); Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility, MM Docket No. 96-176, Report and Order at ¶ 176 (released on August 22, 1997) (grandfathering existing video programming contracts where compliance with closed-captioning requirements would be "inconsistent" with the existing contracts or would cause a breach of contract).